COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 038442-93**
Cheryl Billert	Employee
Rainbow Nursing Home	Employer
Liberty Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Maze-Rothstein & Carroll)

APPEARANCES
Joseph S. Provanzano, Esq., for the employee, Dr. Galena and pro se
Joseph J. Durant, Esq., for the insurer

LEVINE, J. The employee, her chiropractor and her attorney at hearing appeal from a decision in which an administrative judge concluded that all three were jointly and severally liable for violation of § 14(2)'s prohibition against fraudulent claims for compensation benefits. We affirm the decision as to the employee. We reverse the decision as to the employee's attorney and chiropractor. We reserve the right of the insurer to bring a proper § 14(2) claim against the chiropractor, consistent with this opinion.

At hearing the insurer accepted that the employee injured her back at work on October 15, 1993. (Insurer Ex. 1; September 24, 1996 Tr. 4-5[1]; Dec. 2.) The insurer paid weekly benefits without prejudice for a period of time after the industrial injury. (Dec. 2.) The employee brought a claim for workers' compensation benefits, which the insurer

[1] Hereinafter, references to the transcript of the three day hearing are as follows: September 24, 1996, referred to as Tr. I; December 18, 1996, referred to as Tr. II; and March 24, 1997, referred to as Tr. III.

opposed. The insurer also responded by bringing a claim for § 14(2) fraud.[2] The conference took place on June 7, 1994. The employee and insurer cross-appealed the judge's June 20, 1994 conference order, which denied the employee's claim for compensation, but was silent as to the claim for fraud. Id.

The employee started chiropractic treatments with Dr. Steven Galena on December 22, 1993. Dr. Galena treated the employee for her work-related injury until January 21, 1994, when Dr. Galena released the employee from treatment. (Dec. 3.) Later that same day, after she was released by Dr. Galena, the employee was in a motor vehicle accident, in which she was struck from behind, resulting in further injury to her back. Id. Dr. Galena continued to treat the employee, but he attributed the treatment during the next two months to injuries stemming from the motor vehicle accident. Dr. Galena sent the bills for those treatments to Commerce Insurance Company, the insurer for the motor vehicle accident. (Dec. 4; Tr. III, 12.) While Dr. Galena disclosed the workers' compensation injury to Commerce, he did not disclose the motor vehicle accident to the workers' compensation insurer. In a report relating to the employee's workers' compensation claim, written one month after the motor vehicle accident, Dr. Galena opined that the employee "remains totally disabled as of the last visit I had with her pertaining to this industrial accident." (Dec. 4; Feb. 22, 1994 letter, Insurer's Ex. 4.)

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[2] General Laws c. 152, § 14(2), provides, in pertinent part:

> If it is determined in any proceeding within the division of dispute resolution, a party, including an attorney or expert medical witness acting on behalf of an employee . . . , concealed or knowingly failed to disclose that which is required by law to be revealed, knowingly used perjured testimony or false evidence, knowingly made a false statement of fact or law, participated in the creation or presentation of evidence which he knows to be false, or otherwise engaged in conduct that such party knew to be illegal or fraudulent, the party's conduct shall be reported to the general counsel of the insurance fraud bureau. Notwithstanding any action the insurance fraud bureau may take, the party shall be assessed, in addition to the whole costs of such proceedings and attorneys' fees, a penalty payable to the aggrieved insurer . . . in an amount not less than the average weekly wage in the commonwealth multiplied by six.

St. 1991, c. 398, § 37.

This letter was submitted at the June 7, 1994 conference proceeding, where the claim on behalf of the employee was for temporary total incapacity benefits from the date of injury to date and continuing. (Dec. 3-4.)

Dr. Galena resumed submitting bills for treatment to the workers' compensation insurer as of March 16, 1994. (Tr. II, 12; Tr. III, 14.) Later, Dr. Galena wrote in a September 23, 1994 letter that he attributed the employee's back condition directly to her work injury of October 15, 1993, and stated that questioning of the employee "did not reveal any new causation from either injury, disease, or accident relative to her work or home activities." (Employee Ex. 3.) Dr. Galena maintained two separate sets of medical records for the employee's treatment, one for the workers' compensation claim and the other for the motor vehicle accident claim. (Dec. 4.) The workers' compensation insurer subpoenaed all Dr. Galena's records of treatments for the employee. (Insurer's Ex. 2.) Dr. Galena only submitted the records which he attributed to the workers' compensation injury, even though he signed a certification that he was providing all the employee's records in his possession. (Dec. 5; Insurer Ex. 4.) These incomplete records were submitted on behalf of the employee at the June 7, 1994 conference proceeding, (Dec. 5), in support of her claim for temporary total incapacity benefits "from 10/15/93 To Present and Continuing."[3] (Conference Memorandum Cover Sheet.)[4]

At the full evidentiary hearing, the judge heard testimony from the employee and from Dr. Galena. At hearing, the employee claimed § 34 benefits from the date of injury, October 15, 1993 until January 20, 1994, and § 35 benefits from March 17, 1994 until October 12, 1994. (Employee Ex. 2.) The employee thus no longer sought weekly workers' compensation benefits for the two month period, which Dr. Galena testified was related to the motor vehicle accident. (Tr. II, 12.)

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[3] The attorney for the employee at the § 10A conference was not Mr. Provanzano, who represented the employee at the hearing, and who is one of the appellants in this case.

[4] The Conference Memorandum Cover Sheet was not admitted in evidence at the hearing but is a subject for judicial notice. Liacos, Mass. Evidence § 2.8.1 (6th ed. 1994); Barofsky v. Lundermac Co., Inc., 4 Mass. Workers' Comp. Rep. 135, 137 n. 2 (1990).

The judge did not find Dr. Galena to be a credible witness. The judge found Dr. Galena's reports to be misleading, and inferred that his practice of segregating the treatment records of the two injuries from each other "was done to facilitate concealment of the automobile accident from the insurer." (Dec. 5.) The judge was not persuaded, based on Dr. Galena's medical opinion, that the employee had been incapacitated for the claimed periods. (Dec. 5-6.) Furthermore, the judge stated that "a party submitting a claim for compensation, her attorney and her expert witness are all under a duty to make a full disclosure of any facts that bear on her disability, including a subsequent aggravating injury that occurs before the period for which compensation is claimed ends." (Dec. 7.) "The existence of the automobile accident which Dr. Galena thought aggravated the employee's work related injury is certainly a material fact bearing on the subject of Dr. Galena's testimony and the employee's claim for compensation after January 21, 1994. The failure to disclose that accident in presenting the employee's claim for compensation was fraudulent. Since the employee, her attorney and Dr. Galena were all aware of her automobile accident, I find that the nondisclosure was intentional and was done in the course of the proceedings before me." (Dec. 7-8.) The judge thereupon awarded the insurer a penalty under the provisions of § 14(2) as against the employee, Dr. Galena, and the employee's attorney at hearing. (Dec. 8.)

I. Dr. Galena's Appeal

We review the appeal of Dr. Galena first. From his sixty page brief, we discuss one issue that merits reversal of the award of § 14(2) penalties against him. Simply stated, the insurer never adequately notified Dr. Galena that it claimed fraud as to him. (Galena Brief, 28, 39-40.) As such, the minimal requirements of due process were not met. The penalty against the chiropractor cannot stand.

There are certain pertinent facts as to Galena's participation in this proceeding:

1. Galena was never made a party to the hearing. The insurer never filed a joinder motion. Cf. 452 Code Mass. Regs. § 1.20. The only named parties at the hearing

were the employee, employer and the insurer. (Tr. I, 3; Tr. II, 3; Tr. III, 3.) Dr. Galena's presence at the hearing was as a witness, not as a party.[5]

2. The judge merely recited at the beginning of the hearing that the insurer was "raising the defense of § 14." (Tr. I, 5; see also Tr. III, 34, 36-37.) No statement of grounds and against whom the allegations were made was ever read into the record by the insurer. Cf. 452 Code Mass.Regs. § 1.11(3)("Before the taking of testimony in a hearing before an administrative judge, the insurer shall state clearly the grounds on which the insurer has declined to pay compensation or the grounds on which it seeks modification or discontinuance . . ."). The insurer's Issues/Defenses form (Insurer Ex. 1) includes no explanation of the grounds for its § 14(2) claim.
3. There is no appearance of an attorney on behalf of Dr. Galena in the board file. Dr. Galena testified that Mr. Provanzano, attorney for the employee at hearing, had represented his office and himself "on issues." (Tr. II, 17.) This testimony was given in answer to a question inquiring about whether there was a "business relationship" between the two or whether Mr. Provanzano represents Dr. Galena's office "on proceedings." Id. There is nothing in the record indicating that Mr. Provanzano represented Dr. Galena and his office at the hearing. See Vietor v. Spalding, 199 Mass. 52, 53-54 (1908)(general retention of attorney by client did not extend to subject matter of appealed case); Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 522 (1989)("[T]he fact that an attorney agreed to, or did, represent a client in a particular matter does not necessarily create an attorney-client relationship as to other matters or affairs of that client").

All told, the record is clear that at no time in the hearing was Galena formally put on

[5] It is obvious that the judge did not consider Dr. Galena to be a party. On the second day of the three day hearing, when Dr. Galena first appeared as a witness (he apparently was not even present on the first day of the hearing), the judge was concerned that other matters pertaining to the case would not be reached that day. If those matters could not be reached that day, the judge stated, "we'll have another meeting to take care of that, and I am hopeful we'll be able to finish Dr. Galena's testimony so he does not have to take time off from his practice yet another day. But he may have to [do] so . . . But we will do our best." (Tr. II, 3; emphasis added.)

notice that he was being charged with fraud. Contrast Debrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243, 245 (1997) (issue tried by consent).

"No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; . . . ." Mass. Const. Pt. 1, Art. 12. It is well-settled that constitutional due process requirements apply to a hearing before an administrative judge of the Department of Industrial Accidents. Meunier's Case, 319 Mass. 421, 426-427 (1946). At a minimum, a party has a right to proper notice and an opportunity to be heard. Lopes v. Heritage Hall Nursing Home, 8 Mass. Workers' Comp. Rep. 427 (1994). See Haley's Case, 356 Mass. 678, 681 (1970).

> Fundamental considerations of fairness require that administrative decisions involving licenses to engage in lawful occupations be made after a reasonable opportunity for a hearing. See Milligan v. Board of Registration in Pharmacy, 348 Mass. 491, 495 (1965). G.L. c. 30A, § 11. . . . "Due process requires that, in any proceeding to be afforded finality, notice must be given that is reasonably calculated to apprise an interested party of the proceeding and to afford him an opportunity to present his case." [citations omitted.] While constitutional principles require administrative procedures to be reasonable and to comply with the requirements of "natural justice and fair play," [citations omitted] such hearings need not comport with any particular form.

Langlitz v. Board of Registration of Chiropractors, 396 Mass. 374, 376-377 (1985). Fraud allegations against Dr. Galena would jeopardize his license to engage in his lawful occupation. See § 14(2)("A copy of any order or decision requiring the payment of penalties by a physician under this section shall be reported to the appropriate board of registration"). And with the proper notice and opportunity to be heard, he might present a persuasive defense. See Pittsley v. Broadway Chiropractic, 13 Mass. Workers' Comp. Rep. __ , __ (1999) (technical office error and not intent to defraud caused erroneous billing).

There appears to be an absence of opinions addressing the particular situation before us: a witness in a case who is found to be liable on the claim against the party for whom the witness testified. There are, however, cases on fraud that are of assistance

regarding the issue of notice. In a divorce case involving a judge's unsupported finding of collusive fraud on the court as against both parties, as well as their attorneys, the court stated:

> The judge further found that "the plaintiff and defendant [and plaintiff's counsel] made representations to the court that were untrue, as subsequent lies and conduct on their part would confirm . . . with the intention that the court would rely upon them as being made in good faith and being true and in fact it was presented only to deceive this court and they did by such deceit perpetrate a fraud upon this court." If the record had supported these findings then, in addition to setting aside judgments, the judge should have referred the matter to the Board of Bar Overseers for disciplinary action. [citations omitted.] The record does not support the judge's conclusion that there was a fraud on the court.[9]

The court stated in footnote 9 as follows:

> The credit union's motions [which entity the judge considered also to have been defrauded by the parties and their attorneys] did not present any allegation or claim that the plaintiff, defendant, or their attorneys had committed fraud, much less fraud on the court, which implies corrupt conduct. *Thus, prior to the issuance of the findings and order, the parties and their attorneys received no notice of any claim of fraud and no opportunity to be heard, to present testimony, to cross-examine witnesses, or to offer evidence. This violated minimum requirements of due process.*
>
> "[N]otice of charges or reasons for deprivation of a protected interest must be provided before that deprivation can be effected." Matter of Saab, 406 Mass. 315, 323 (1989). . . . [T]he usual safe-guards of adversary proceedings must be observed. . . ." Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946).

MacDonald v. MacDonald, 407 Mass. 196, 200-201 & n. 9 (1990)(emphasis added). Likewise, it would appear in the present case that "the usual safe-guards of adversary proceedings" have not been followed -- no formal notice of the charges against Dr. Galena was ever made. A case dealing with the revocation of a professional license stated the curative effect of notice even when made belatedly:

> Due process requires that, in any proceeding to be accorded finality, notice must be given that is reasonably calculated to apprise an interested party of the proceeding and to afford him an opportunity to present his case. Konstantopoulos v. Whately, 384 Mass. 123, 133 (1981). The letter of February 9, 1981,

> [informing plaintiff of a hearing pertaining to his license] may have been constitutionally deficient since it gave no notice of grounds on which the board intended to proceed. That deficiency, however, was cured at the first meeting with the board on February 19 when [the plaintiff], with his counsel present, received precise notice . . . and adequate time in which to prepare for the hearing.

Lapointe v. License Bd. of Worcester, 389 Mass. 454, 458 (1983). In the present case, there was not even "deficient" notice of the fraud allegation against Dr. Galena. Nor was there an appearance of an attorney representing him at the hearing.

As already pointed out, there is nothing in the record to indicate that Dr. Galena was anything but a witness. Germane to that fact is a contempt case, Commonwealth v. Carr, 38 Mass. App. Ct. 179 (1995), in which the Appeals Court reversed a court's judgment of contempt against two witnesses in a criminal trial for failing to appear. The court reasoned:

> As a preliminary matter, the trial judge must warn individuals that they are in danger of being charged with contempt of court before contempt rules may be invoked. See Sussman v. Commonwealth, 374 Mass. 692, 697, 700 (1978). Here, no prior warnings were given to either of the defendants that her failure to appear as ordered would amount to contempt of court for which she could be fined or imprisoned. Contrast Commonwealth v. Corsetti, 387 Mass. 1, 7 (1982)(the witness "was not taken by surprise"). A careful reading of the transcript reveals that, in fact, the defendants were neither told of the significance of being recognized as a witness nor warned of the consequences of failure to appear.
>
> Because of the absence of a proper warning, the adjudication of contempt cannot stand.

Carr, supra, at 181. Similarly, "[b]ecause of the absence of a proper [notice], the adjudication of [fraud against Dr. Galena] cannot stand." Id. Cf. Davis v. Cumberland Farms, 12 Mass. Workers' Comp. Rep. 526 (1998)(reversing judge's denial of insurer's fraud claim, which denial was based on the judge's finding that the insurer's § 14(2) allegation that the employee misrepresented his weekly income was not notice of § 14(2) claim based on misrepresentation as to number of hours worked per week). We reverse the decision as to that conclusion, without prejudice to the insurer to bring a properly noticed claim of fraud against Dr. Galena. See § 8(6)("Any payment without prejudice

under this section shall toll the statute of limitations pursuant to section forty-one"); § 41 ("The payment of compensation for any injury pursuant to this chapter or the filing of a claim for compensation as provided in this chapter shall toll the statute of limitations for any benefits due pursuant to this chapter for such injury").

II. Attorney Provanzano's Appeal

The judge's finding of fraud as against the employee's attorney at hearing, Mr. Provanzano, also cannot stand as a matter of law. There was no failure to disclose anything on his part at the conference. Attorney Provanzano was not present at the June 7, 1994 conference, where a different attorney, Mr. Morrow, presented the claim. At that proceeding, Mr. Morrow claimed continuing temporary total incapacity benefits through the two month period of treatment for the motor vehicle accident. (Conference Memorandum Cover Sheet.) Dr. Galena's medical reports, which omitted mention of the motor vehicle accident, were submitted by Mr. Morrow, the employee's counsel, at the conference. (Dec. 5.) But, as of the time of the hearing, Attorney Provanzano did not make that two month claim, (Employee Ex. 2), for the two month period of incapacity related, per Dr. Galena's opinion, only to the motor vehicle accident. Moreover, the fact that the motor vehicle accident had occurred was entirely out on the table. (Tr. I, 18-19.) There was nothing fraudulent about anything that Provanzano claimed on the part of the employee at the hearing.

To the extent that the insurer alleges Attorney Provanzano is accountable for Mr. Morrow's conduct at the conference, the claim falls short. There is no evidence in the record regarding any business relationship between Provanzano and Morrow that might warrant such vicarious liability. If the insurer relies on the theory of "partnership by estoppel," Brown v. Gerstein, 17 Mass. App. Ct. 558, 571 (1984), there is, likewise, no evidence to support such a claim. As to partnership by estoppel the elements are:

1. the would-be partner held himself out as a partner;
2. such holding out was done by the defendant directly or with his consent;
3. the plaintiff had knowledge of such holding out;
4. the plaintiff relied on the ostensible partnership to his prejudice.

Id. There is nothing in the evidence regarding Mr. Morrow's holding himself out as a partner of Mr. Provanzano. Mr. Morrow's conduct at the conference was not Mr. Provanzano's responsibility as a matter of law. The decision is reversed as to the finding of fraud against Mr. Provanzano.

III. The Employee's Appeal

We affirm the judge's finding of § 14(2) fraud against the employee on the basis of principal/agent law. When Attorney Morrow presented the employee's claim for temporary total incapacity benefits at conference, based on Dr. Galena's medical reports (which lack any mention of the motor vehicle accident), he bound the employee as to the matters represented within his authority as her attorney. We agree with the insurer that the judge's findings, (Dec. 4-5; see also Dec. 7-8), support her conclusion that "[t]he failure to disclose [the motor vehicle] accident in presenting the employee's claim for compensation was fraudulent." (Dec. 8.) The fraud, occurring as it did at the conference, falls within the requirement that it take place "in any proceeding." G.L. c. 152, § 14(2). See Murphy v. Trans World Airlines, 11 Mass. Workers' Comp. Rep. 94, 98-99 (1997). Furthermore, there was detriment to the insurer in that at the conference it had to defend against a claim in which an important potential factor -- the motor vehicle accident -- was not disclosed by the employee. See Williams v. Evans Transp., 12 Mass. Workers' Comp. Rep. 162, 165 (1998). The judge's decision sufficiently details conduct that falls within § 14(2)'s proscription against "conceal[ing] or knowingly fail[ing] to disclose that which is required by law to be revealed" and participation in the "presentation of evidence which [the party] knows to be false."[6] We now examine the employee's liability under § 14(2).

[6] The fact that at the hearing the employee withdrew her claim for benefits during the two month period Dr. Galena testified was related to the motor vehicle accident, (Employee Ex. 2; Tr. II, 12), does not vitiate the fraud committed at the conference. The judge found that the employee did not disclose the motor vehicle accident until the insurer learned of it. (Dec. 4.) Compare Pirelli v. Caldor, Inc., 11 Mass. Workers' Comp. Rep. 380, 382 (1997) ("under § 14(2), a retraction or correction does not necessarily exculpate a party or neutralize the false evidence previously created. The recantation or correction is only effective if it occurs before it has become manifest to the party that her falsity has been or will be exposed").

The relationship of the attorney to the client is that of agent to the principal. Barrett v. Towne, 196 Mass. 487 (1907). "Generally, the fraud of an agent acting in the course of his employment binds his principal." Makino, U.S.A., Inc. v. Metlife Capital Credit Corp., 25 Mass. App. Ct. 302, 313 (1988), citing Bockser v. Dorchester Mut. Fire Ins. Co., 327 Mass. 473, 477 (1951). As long as the attorney agent's conduct was intended to benefit the principal client, "the receipt of a benefit by a [principal] is not an essential element in a cause of action for deceit." McCarthy v. Brockton Nat'l Bank, 314 Mass. 318, 325 (1943).[7] As the acts of Attorney Morrow in presenting the employee's claim for compensation at conference were clearly acts which were performed in the course of his employment for the employee principal, we are only left with a question of whether the special relationship between an attorney and his client somehow carves a particular exception to this agency rule of law. See Burt v. Gahan, 351 Mass. 340, 342 (1966)("While in a broad sense counsel may be an agent and his client a principal, there is much more involved than mere agency. The relationship of attorney and client is paramount, and is subject to established professional standards. In short, the attorney, and not his client, is in charge of litigation, and is so recognized by the court"). While there is no Massachusetts law directly on point, we consider that the general rule binding the employee for her attorney's misrepresentations should apply here.

Massachusetts courts have relied on the Restatement (Second) of Agency (1958). See Weisman v. Saetz, 11 Mass. App. Ct. 440, 442 (1981); Makino, U.S.A., Inc., supra at 313. Two sections of the Restatement speak particularly to the issue of the employee's liability for her attorney's conduct at conference. First, and most specifically, Restatement (Second) of Agency § 253 states:

> A principal who authorizes a servant or other agent to institute or conduct such legal proceedings as in his judgment are lawful and desirable for the protection of

[7] An exception to this general rule is when an agent's fraudulent acts are both unauthorized and do not benefit the principal. Sunrise Properties, Inc. v. Bacon, Wilson, Ratner, Cohen , Salvage, Fialky & Fitzgerald, P.C., 425 Mass. 63, 67 (1997); Tremont Trust Co. v. Noyes, 246 Mass. 197, 207 (1923). This exception does not apply to the present case, since the claim made at conference by Attorney Morrow on behalf of the employee was clearly in the course of his employment and for the benefit of the employee.

> the principal's interests is subject to liability to a person against whom proceedings reasonably adapted to accomplish the principal's purposes are tortiously brought by the agent.

Comment a. to that section explains:

> The principal is liable only if the conduct of the agent is, in part at least, to carry out the purposes of the principal. The situation most frequently arising which involves the rule stated in this Section is that in which *an attorney at law tortiously institutes or continues civil or criminal proceedings, or is guilty of oppressive or wrongful conduct during the course of the proceedings, in order that he may enforce a claim of the principal.* The fact that the attorney is subject to discipline by the court does not prevent the client from being liable for his conduct.

(emphasis added). There is no Massachusetts case applying this particular section of the Restatement of Agency. Some other jurisdictions, however, provide persuasive authority for its application in a case such as the present one. In Bridge C.A.T. Scan Associates v. Ohio-Nuclear Inc., 608 F.Supp. 1187 (S.D.N.Y. 1985), the court dismissed an argument that a statement of counsel cannot be imputed to a client:

> That Bridge's counsel authored the statements contained in the letter does not shield Murphy from liability. . . . A client and his attorney stand in the relationship of principal and agent. As such, a client may be responsible for statements made for the purpose of aiding, and within the scope of, his legal representation.

Id. at 1197 (footnote citing Restatement (Second) of Agency § 253 omitted). In SEI Corp. v. Norton & Co., 631 F.Supp. 497 (E.D.PA. 1986), the court analyzed a similar situation:

> While it is probably true that van Putten assumed that his authorized counsel would take proper and expedient actions to protect his interests, van Putten is nonetheless liable to plaintiff for the actions or inactions of his authorized agent.
>
> . . . .
>
> The court is not unmindful of the result such a ruling may ultimately have upon Mr. van Putten. His misfortune is not a direct result of any action or inaction on his own behalf but a result of the actions and inactions of attorneys claiming to

> represent him and actually representing him. Such legal ineptitude, however, may be the cornerstone of a remedy van Putten may wish to pursue at a later time.

Id. at 503 (footnote citing Restatement (Second) of Agency § 253 omitted). The present case falls well within the persuasive view of the courts in these two federal cases.

The next, more general, section of the Restatement (Second) of Agency pertinent to this case is § 257:

> A principal is subject to liability for loss caused to another by the other's reliance upon a tortious representation of a servant or other agent, if the representation is:
> (a) authorized;
> (b) apparently authorized; or
> (c) within the power of the agent to make for the principal.

Comment b. states, "A principal, although personally innocent, is liable in an action of deceit under the rule stated in this Section if the agent's conduct constitutes deceit." Two Massachusetts cases citing this section are apposite to the present case.

In Bockser v. Dorchester Mut. Fire Ins. Co., 327 Mass. 473 (1951), the insurer contended that the plaintiff was not entitled to coverage for his fire loss due to the fraud of a public adjuster hired by the plaintiff. Id. at 474. Like the present case, the fraud was detected, and no ill-gotten gain was realized. Id. at 476-477. Also, there was no contention that the plaintiff personally had attempted any fraud, and the record was that the plaintiff knew nothing about adjusting a loss, and that he left the whole course of the adjustment and claim to the hired adjuster. Id. at 474-475. Citing the first Restatement of Agency § 257, the court held that the plaintiff (principal) was barred from recovering under the policy due to the wholly independent fraud of the adjuster (his agent):

> The precise question is whether an agent's attempt to defraud, which was wholly unsuccessful, should be treated the same as similar conduct on the part of the principal and should result in forfeiture of the principal's rights under the policies. This is a matter upon which there is a difference of opinion in other jurisdictions. [citations omitted.] The majority, and we think the better reasoned, view is that the attempted fraud of the agent acting in the scope of his employment binds the principal. . . . Any other result would tend to circumvent the public policy which calls for the enforcement of the clause in the Massachusetts standard policy now before us [barring coverage for an attempt to defraud the insurer. Citation

> omitted.] All that would be necessary is a complete delegation by the insured of the responsibility for the adjustment of the loss to a third party whose acts might be disavowed at the option of the insured to escape the consequences.

Id. at 478-479. The present case is similar. While Attorney Morrow was completely in charge of presenting the employee's claim at conference, the employee was still responsible for Morrow's attempt to fraudulently augment the value of her claim by failing to reveal the occurrence of the motor vehicle accident. Likewise in Rousseau v. Gelinas, 24 Mass. App. Ct. 154 (1987), the defendant wife's lack of knowledge of and participation in her co-owner and broker husband's fraud was not enough to negate the agency relationship and insulate her from liability in a sale of property. Id. at 157-158. The court also cited the Restatement (Second) of Agency § 257, as support for holding the defendant wife vicariously liable, although she "played a passive and seemingly insignificant role in [the] transaction." Id. at 159.

We therefore affirm the judge's conclusion that the employee was liable under § 14(2) for the fraudulent nondisclosure of the motor vehicle accident in the conference proceeding. But we reverse the decision as to the findings of § 14(2) fraud on the part of Attorney Joseph Provanzano and Dr. Steven Galena, without prejudice, however, as to Dr. Galena. We also summarily affirm the portion of the judge's decision denying the employee's claim for compensation on the basis that the judge did not find Dr. Galena to be a credible witness. (Dec. 5-6.)[8]

So ordered.

[8] A report by Dr. Gardner Fay was not admitted in evidence. (Dec. 1-2.)
We also note that the judge's independent and alternative basis for denying the employee's claim - - that the subsequent motor vehicle accident "was performed negligently" and "was not reasonable and normal" (Dec. 6) -- is a misstatement of the law. See Squires v. Beloit Corp., 12 Mass. Workers' Comp. Rep. 295, 297-299 (1998).

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

FEL/kai
Filed: **November 3, 1999**